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No. 91-1833

In The

Supreme Court of the United States

October Term, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, *et al.*,

Petitioners,

vs.

GROVER VIGIL, *et al.*,

Respondents.

On Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the agency's decision to terminate the Indian Children's Program (ICP), an on-going program established pursuant to congressional mandate and funding and agency rules governing eligibility and program services which for many years provided a crucial array of clinical and support services to handicapped Indian children with whom the United States has a special relationship, constitutes informal rulemaking subject to the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553.

2. Whether the court of appeals erred in holding that the special relationship between the Indian people and the federal government, the Snyder Act, 25 U.S.C. 13, and congressional creation and funding of a program providing clinical and support services to handicapped Indian children under the Snyder Act and Indian Health Care Improvement Act, 25 U.S.C. 1601 *et seq.*, provide "law to apply" for purposes of judicial review under the APA, 5 U.S.C. 701 *et seq.*, of the agency's termination of the program's services, where a strong presumption favors review, statutes enacted to benefit Indians provide law to apply which must be liberally interpreted in their favor, prior agency actions and rules established the children's ongoing eligibility for ICP services, the government provides health care to Indians pursuant to their special relationship, and the agency decision to terminate the ICP was based on an unjustified assumption that other resources would provide its services to the children.

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STATUTORY PROVISIONS INVOLVED

Relevant portions of the Snyder Act, 25 U.S.C. 13, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, are found at Pet. App., 57a-58b and 63a-66a. Relevant portions of the Indian Health Care Improvement Act, 25 U.S.C. 1601 *et seq.*, the Indian Health Service manual, and additional relevant portions of the Administrative Procedure Act, are set forth at Resp. App. 1a-16a. ICP eligibility rules are set forth at Pet. Reply App. 1a-2a.

STATEMENT OF THE CASE

The Indian Children's Program ("ICP") is a joint program established by the Indian Health Service ("IHS") and Bureau of Indian Affairs ("BIA") in response to a critical unmet need for diagnostic and treatment services for handicapped Indian children. J.A. 43. After initiating the ICP in the late 1970's, establishing objectives and eligibility criteria, and renewing funding for the program for over a half-a-decade, the IHS and BIA abruptly terminated the program in 1985. The district court and court of appeals both held that the decision to terminate the program was subject to judicial review, but found that it was unnecessary to decide the merits of whether the decision was contrary to relevant law or arbitrary and capricious. 5 U.S.C. 706. They concluded that the decision to terminate was procedurally defective because before terminating the program, the agencies were first required to comply with the Administrative Procedure Act's provisions for publication of agency statements of policy, 5 U.S.C. 552(a)(1) and for notice and comment of an informal rulemaking, 5 U.S.C. 553. Accordingly, the district court ordered the agencies to reinstate the ICP until such time as they provided notice of the reasons for their decision and considered public comment from interested parties. Pet. App. 54a-55a. The court of appeals affirmed the district court's order and defendants sought review in this court. As a result, the ICP remains in place under the district court's reinstatement order. The only issues before this Court on review are whether there is "law to apply" for judicial review of the agencies' action and

whether the agencies are required to comply with informal rulemaking notice and comment provisions before terminating the ICP.

1. The Indian Children's Program

The ICP was established to carry out the mandates of the Snyder Act, 25 U.S.C. 13 and Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq*. The Snyder Act requires the IHS and BIA to "direct, supervise, and expend [Congressional appropriations] for the benefit, care, and assistance of the Indians throughout the United States" for specific purposes, including "[f]or relief of distress and conservation of health." 25 U.S.C. 13. The IHCIA was enacted in 1976 to supplement existing Indian health care programs. Title II of the Act authorized appropriations for specific programs, including "[t]herapeutic and residential treatment centers." 25 U.S.C. 1621(c)(4)(D). The IHCIA provides that funds appropriated under the Act are not to be used to displace or duplicate the services of other programs, but "to supply known, unmet medical, surgical, dental, optometrical, and other Indian health needs." 25 U.S.C. 1621(a).

IHS initiated what became known as the ICP by allocating $270,000 and 11 positions from its fiscal year 1978 general IHCIA Title II appropriation to the IHS Headquarters mental health branch in Albuquerque, New Mexico for the planning and development of a handicapped children's project, then referred to as the "Indian Children's Village." *Department of the Interior and Related*

Agencies Appropriations for 1979: Hearings before a Subcommittee of the Committee on Appropriations ("Approp."), Senate, 95th Cong., 2d. Sess., pt. 2, 252. At that time, IHS envisioned establishing a therapeutic and residential treatment center for disturbed Indian children "to focus effort and integrate resources in dealing with the problems of the handicapped child in accord with the philosophy and intent of" the IHCIA, and sought $3.5 million from Congress to construct such a center. *Approp. for 1978, House*, 95th Cong., 1st Sess., pt. 4, 182; *Approp. for 1979, Senate*, 95th Cong., 2d Sess., pt. 2, 252. Congress did not fund the proposed center, but, instead, appropriated $300,000 for fiscal year 1980 to the IHS to develop and expand program services into a nationwide program for handicapped Indian children in conjunction with the BIA. The funds were to be used "to provide diagnostic service[s] to children with complex problems who reside nationwide and who require a sophisticated medical treatment for their disorders." *See*, Pet. App. 5a and n. 2.

In 1979, the ICP became a joint project of the BIA and IHS. J.A. 29. The effort to fund a center was abandoned, and the ICP concentrated on developing interdisciplinary teams that traveled to reservation areas to provide diagnosis and treatment of the unmet medical needs of handicapped Indian children throughout the Southwest. These ICP teams consisted of persons qualified in physical therapy, speech pathology, occupational therapy, developmental psychology, educational diagnostics, art therapy, clinical psychology, and developmental pediatrics. J.A. 97.

The ICP provided an array of services to the children which included diagnosis of their handicaps, development and monitoring of their treatment plans, consultative visits in their home communities, training, and direct services such as physical therapy. The majority of children seen by the ICP were learning disabled, emotionally disturbed, mentally retarded, cerebral palsied, communication disordered or multiply handicapped. J.A. 11, 20. The vast majority of these direct, clinical services were provided to children in reservation areas in New Mexico, Colorado, Utah, and Arizona. This regional model was viewed as the foundation for expanding and replicating the same services in other areas. *Approp. for 1983, House*, 97th Cong., 2d Sess., pt. 9, 182.

In addition to these direct services to the children, the ICP also provided training and educational services nationwide. J.A. 75; R. 70, Exh. 5, No's 25-51; Kreuzberg Depo., Exh. 2. This national component included training in child development, prevention of handicapping conditions, and care of handicapped children to parents, community groups, school and health care personnel.

The joint agency interdisciplinary team approach of the ICP was soon judged a success. J.A. 53. It provided "a practical and economically feasible method by which the two agencies" could "fulfill their respective legal mandates [under the IHCIA and Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. 1400 *et seq.*] in providing diagnostic and treatment planning services to handicapped Indian children." *Id.* Each year from 1980 through 1985, IHS represented to Congress that it continued to successfully operate the ICP to serve handicapped Indian children in response to Congressional

interest, and sought, and was provided renewed funding. *See*, Pet. App. 11a-13a and n. 6.

The IHS and BIA also promulgated eligibility criteria for the ICP during this time:

> The ICP will see any IHS or BIA/OIEP[Office of Indian Education Programs] eligible child from birth through 21 years who either has, is suspected of having, or is at risk of having a physical, mental, emotional handicap or combination of handicaps. *Handicap* is defined as an inability to function in a normal fashion. Severity of handicap is not a consideration for eligibility.
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> * * *
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> Any organization involved with Indian children, partially or totally, is eligible to receive education and training program services from ICP. Pet. Reply App. 1a.

The number of children in the Southwest who were eligible for ICP services was considerable. During a four-month period from November, 1979 through February, 1980, the ICP evaluated 329 Indian children and determined that 282 of them were handicapped and needed further action by the ICP. J.A. 61. During the next 12 month period, the ICP performed 2,011 diagnostic assessments, 1,803 case reviews, and provided direct services to 1,692 children. J.A. 62. In 1984, IHS Director Rhoades stated that while the ICP carried a registry of about 1700 children, it was his opinion that substantially less than half of the handicapped children eligible for the program were identified by IHS. *See*, R. 14, Exh. G.

2. Termination of the ICP

In 1985, the IHS unilaterally decided to terminate all of the direct services the ICP provided to handicapped Indian children. The decision was made without consulting the BIA, the Tribes, or the families of the children affected. The decision to terminate the program was never published in the Federal Register, nor was any formal statement of the reasons for the IHS change in policy provided. R. 70, Exh. 2, No's 11-14; R. 72 at 46; J.A. 99. Instead, the decision was announced to various IHS office and referral sources on August 21, 1985, J.A. 80; R. 70, Exh. 7, (Exh. 47). The BIA then withdrew from participation in the ICP and limited eligibility for its special education services to those children it was obligated to serve under the Education for All Handicapped Children Act. R. 70, Exh. 2, No. 4. These children were school age and enrolled in a BIA school. J.A. 100.

The termination of the ICP had a devastating effect. Many basic services for handicapped children, including services identified in the IHS Manual as health services that the IHS is to provide for Indian children, were no longer available from IHS. Chapter 13 of the IHS Manual states that "this section sets forth the IHS . . . responsibilities for meeting specific health needs of infants and children," and that "services must be provided that will emphasize the importance of preventing handicapping conditions or preventing the extension of existing conditions." IHS Manual 3-13.6(A). The Manual goes on to list specific services to be provided, including testing children for early identification of defects that may lead to handicaps, monitoring of children with handicaps, and "frequent and continuing medical attention." *Id.* at

3-13.6(F)(3). Following the termination of the ICP, such services were no longer available from the IHS for many handicapped Indian children. Handicapped Indian children could no longer obtain the screening and evaluation, physical therapy, occupational therapy, speech/language therapy, monitoring and other services previously provided by the IHS and BIA through the ICP. R. 108, Exh. 2-13, 15-16.

Moreover, in many instances, these services were not available from any sources. Thus, the ICP termination resulted in many known needs going wholly unmet because the children could not obtain the necessary services anywhere in the communities in which they lived. *Id.*; R. 70, Exh. 7 (Exh. 43-44). Lengthy, time-consuming and expensive trips to Albuquerque were often the only means to obtain any necessary services. R. 108, Exh. 2, 6, 10, and 13.

The effect of the ICP termination was particularly acute for pre-school children. Early detection and intervention services for handicapped children are crucial. J.A. 98. Without these services many pre-school children become further handicapped by the time they reach school age. *Id.* As noted above, one of the effects of the ICP termination was that eligibility for special education services available to handicapped children of any age was limited to children in BIA schools who qualified for such services under the Education for All Handicapped Act. Estimates by the General Accounting Office indicate that there are thousands of preschoolers in the Southwest

alone who lost their eligibility for these services upon termination of the ICP.[1]

The IHS official responsible for the decision to terminate the ICP also failed to adequately consider the unavailability of alternative services before making the decision, incorrectly assuming that the children would continue to receive the same services that they had been receiving from the ICP from other sources. Kreuzberg Depo. pp. 72-73, 81,87,90-91, 95, 107-108, and Exh. 12. Community health care providers, within and without IHS, expressed great concern that the ICP termination eliminated critical services for handicapped Indian children that could not be replaced or duplicated. R. 70, Exh. 5, No's 54-71; R. Exh. 7 (Exh. 42-46, 50-51, 56, 57, 60, 61, 62, 64) However, because the decision to terminate the ICP was made without prior notice and comment, they were not afforded an opportunity to present their views to agency officials before the decision was made.

3. Proceedings Below

A suit challenging the ICP termination was filed on September 26, 1986, on behalf of handicapped Indian children eligible for ICP services. J.A. 5. The complaint challenged the termination of the ICP services on the

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[1] GAO Report, "Special Education: Estimates of Handicapped Preschoolers and Sufficiency of Services," March, 1990. Based on handicapping condition prevalence report estimates, there are 650 handicapped Indian preschool children in New Mexico and 2,485 in Arizona. *Id.* at 42.

basis that the action violated the publication requirements of the APA, 5 U.S.C. 552(a)(1), and the requirements of notice and comment for informal rulemaking under the APA, 5 U.S.C. 553. The children also charged that the decision violated the Snyder Act, Indian Health Care Improvement Act, federal trust responsibility to Indians, various agency rules, their Fifth Amendment due process rights, and was arbitrary and capricious. Plaintiffs alleged that the termination of the ICP deprived them of essential diagnostic, evaluation, treatment planning and therapy services, and that these services were not available from the IHS or alternative sources. Plaintiffs sought declaratory and injunctive relief requiring defendants to reinstate the ICP.

The district court certified a class of handicapped Indian children eligible for ICP services, and granted them summary judgment. It ruled that the ICP termination was subject to judicial review under the APA, rejecting defendants' argument that the decision was committed to agency discretion under 5 U.S.C. 701(a)(2) because there is no law to apply. The court concluded that the Snyder Act, the IHCIA, the EAHCA, the federal government's trust duty to Indians, and the agency's representations to Congress concerning the ICP provided ample law to apply.[2] Pet. App. 30a. In particular, the

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[2] Under the Education for All Handicapped Children Act, 20 U.S.C. 1400 *et. seq.*, the BIA is responsible for identifying, evaluating, and providing handicapped Indian children on Indian reservations with a free appropriate public education which emphasizes special education and related services to meet their unique needs. Congress expressly provided for the BIA to receive funding for the education of these children

court noted that the Snyder Act provided law to apply because review of defendants' action against the statute's provisions presents "a palpable question: whether the action ultimately does redound to the 'benefit, care, and assistance' of Indians" or whether it "defeats congressional purposes or flouts the legislative mandate." Pet. App. 31a. The court also noted that the agency's own regulations and departure from past policy and practices provide law to apply for review of the agency decision. Pet. App. 32a and n. 10.

The district court however, found that the termination decision was not ripe for a determination on the merits because the agencies had failed to comply with the procedural requirements of the APA. Pet. App. 34a-35a. The district court concluded that the decision to terminate the ICP was a "statement of general policy" that the agencies were obligated to publish in the Federal Register under 5 U.S.C. 552(a)(1). Pet. App. 41a-42a. In addition, the district court found that the impact of the termination

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pursuant to the requirements of the EAHCA. 20 U.S.C. 1411(f)(1982). The ICP was funded and operated as a way for the BIA to meet its obligations under the Act. J.A. 53, 65 95-96; *Approp. for 1980, Senate*, 96th Cong., 1st Sess., pt. 2, 1542,1543. Since the EAHCA addresses many of the services provided by the ICP to handicapped Indian children, including their identification, evaluation, placement, and related services, 20 U.S.C. 1413, the district court was correct in finding that it provides law to apply. In addition, 20 U.S.C. 1412(7) specifically required the BIA to provide public hearings and comment opportunity prior to its adoption of policies, programs, and procedures affecting its provision of special education services. The BIA admitted no such procedures were followed when the ICP was terminated. J.A. 98; R. 70, Exh. 2, No's 11, 14.

of the program on the rights of those eligible for its services demonstrated that it was more than merely a statement of policy and constituted "legislative" rulemaking under the APA. Pet. App. 39a-40a. Accordingly, the court concluded that in addition to failing to comply with the publication requirement, the action was also defective because the agencies had failed to follow notice and comment procedures before making their decision. *Id.*

The agencies appealed, arguing that the termination of the ICP was committed to agency discretion, that the decision to eliminate the ICP was not rulemaking subject to the notice and comment procedures of 5 U.S.C. 553, and that the decision was not arbitrary and capricious. The government did not appeal the district court's independent holding that the decision to terminate the ICP was a statement of policy that the agency was obligated to publish in the Federal Register under 5 U.S.C. 552(a)(1), nor did it appeal the relief granted by the district court.

The Court of Appeals for the Tenth Circuit reviewed the district court's decision *de novo* and affirmed its grant of summary judgment to the children. The court of appeals agreed that the statutes, statements by the agency concerning the ICP, and the special fiduciary responsibility of the federal government to Indians provided law to apply in reviewing the agency's decision. It also found that the district court was correct in holding that APA notice and comment proceedings were necessary, citing *Morton v. Ruiz*, 415 U.S. 199 (1974), in which this Court held that the government could not change its eligibility requirements for a federally funded benefits

program for Indians without complying with the notice and comment procedures of the APA.

SUMMARY OF ARGUMENT

1. The termination of the Indian Children's Program, which eliminated the children's on-going eligibility for its services, was a legislative "rule" which the agency implemented in violation of the procedural requirements of the APA. The notice and comment requirements of 5 U.S.C. 553 were designed to ensure fairness and mature consideration of rules of general applicability. Having established the program to provide critically needed "[t]herapeutic and . . . treatment" services to handicapped Indian children and having adopted eligibility criteria specifying the services to be provided and defining those who would be served, the agency was required to inform the public and those eligible for these services before changing its rules. 25 U.S.C. 1621 (c)(4)(D). Having pursued a policy of providing handicapped Indian children with services through the ICP for many years and continuously representing this policy to Congress during those years, the agency was obligated to comply with the notice and comment requirements "to avoid the inherently arbitrary nature of unpublished ad hoc determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The goal of fairness through legislative rulemaking is particularly important here, where the special Federal-Indian relationship requires of the agencies an "overriding duty . . . to deal fairly with Indians wherever located." *Id.* at 236. Thus, the court of appeals was quite correct in determining that "notice and comment procedures should be provided any

time the government 'cuts back congressionally created and funded programs for Indians.'" Pet. App. 15a.

2. Since the government did not appeal the district court's holding that the termination decision was a "general statement of policy" which the agency was required to publish in the Federal Register before it could become effective, the relief granted below must be affirmed.

3. Instead of dealing fairly with the children, the agency abruptly changed its policy, terminating all of the services it had provided to them, doing so despite the fact that alternative resources to replace those of the ICP were not available. The agency not only "failed to consider [this] important aspect of the problem," *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), it also failed in its "consideration of the relevant factors." *Citizens to Preserve Overton Park v. Volpe*, 410 U.S. 402, 415 (1971). Instead of "maintain[ing] and improv[ing]" their health and providing them with the "quantity and quality of health services which will permit the[ir] health status . . . to be raised to the highest level possible," the ICP termination *created* a situation which seriously harmed the children and lowered their health status. 25 U.S.C. 1601(a) and (b) and 1602. This undermined the "Indian people's growth of confidence in Federal Indian health services" upon which "[p]rogress toward the goal of better Indian health is dependent." 25 U.S.C. 1601(g). Instead of providing them with "benefit, care, and assistance," as required by the Snyder Act for their "relief of distress," the ICP termination caused them great harm. Thus, the agency not only failed to consider important facts bearing on its decision and those very factors Congress was concerned with in acting the IHCIA,

but it acted in a manner directly contrary to the purposes of these statutes.

Congress gave every person adversely affected by an agency's action the right to judicial review. The right to this review is presumed in every case and is so strong that it can only be denied when a statute specifically precludes such review, or the matter is committed to agency discretion by law. Only when there is no law to apply by which a reviewing court can meaningfully judge the agency's action can it be committed to agency discretion. This exception is a rare and very narrow exception. Here, where the Snyder Act and IHCIA express the clear purposes which Indian health care is intended to accomplish, and set out specific factors which Congress wants the IHS to consider in making its health care decisions, it cannot be said that there is *no law* to appiy. In addition, the actions of the agency in establishing the ICP, in pursuing a policy of providing services to handicapped Indian children through the ICP, in adopting eligibility rules for the provision of these services, and in representing to Congress its policy, eligibility rules, and provisions of services, provide law by which its termination decision can be reviewed.[3]

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[3] The children also stated a constitutional due process claim, Pet. App. 29a, which requires judicial review even if judicial review is otherwise precluded by 701(a)(2). *Webster v. Doe*, 486 U.S. 592 (1988).

ARGUMENT

I. THE ICP TERMINATION ACTION WAS A "RULE" SUBJECT TO APA NOTICE AND COMMENT REQUIREMENTS.

A. The Procedural Requirements of the APA Provide Law to Apply

Judicial review is proper when claims are presented that procedural requirements of the APA have been violated. Adequate procedure is a legal judgment and must be guaranteed by the courts. C. Koch, Jr., *Administrative Law and Practice*, II, 136. 5 U.S.C. 552 and 553 set out binding procedural requirements which themselves provide "law to apply".[4] Actions violating these requirements must be set aside as "not in accordance with law." 5 U.S.C. 706(2)(A), or "without observation of procedure required by law." 5 U.S.C. 706(2)(D).[5] The district court thus exercised wise judicial restraint in determining only the APA procedural issues, thereby avoided unnecessary use of judicial resources to decide the other claims which were ripe for review only upon prior agency compliance

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[4] The government concedes that 5 U.S.C. 553 provides "law to apply" even when a reviewing court lacks jurisdiction to review the merits of an agency decision. Govt. Brief at 10, n. 8.

[5] The prefatory phrase, "to the extent that," 5 U.S.C. 701(a), establishes that an action can be partially reviewable. R. Levin, 74 Minn. L. Rev. 689, 701, (1990) Only "to the extent that" there is no law to apply is the action unreviewable. Here, whether or not the merits of the ICP termination would ultimately withstand "arbitrary and capricious" review, the manner in which the IHS terminated the ICP can be reviewed under the procedural requirements of the APA.

with the APA procedural requirements. *Bellarno International v. FDA*, 678 F.Supp. 410 (E.D.N.Y. 1988).

B. The Agency Decision to Terminate Services to Eligible Handicapped Children Under the ICP Was A "Rule".

An APA "rule", 5 U.S.C. 551(4), has three distinct elements: (1) it is the whole or part of an agency statement; (2) it is of general or particular applicability and future effect; and (3) it is designed to implement, interpret or prescribe law or policy, *Abbs v. Sullivan*, 756 F.Supp. 1172 (W.D. Wis. 1990). Rulemaking can be described in terms of three key indicators: (1) generalized nature, (2) policy orientation, and (3) prospective applicability. Koch, I, 61.

The predominant characteristic of a rule is that it has future effect. *PBW Stock Exchange, Inc. v. Securities and Exchange Commission*, 485 F.2d 718 (3d Cir. 1973), *cert. den.* 416 U.S. 969 (1974). The prospective operation of the rule separates it from that of an order, which serves as a determination of past conduct or present status. J. O'Reilly, *Administrative Rulemaking*, 2.01. While rulemaking gathers information about past conduct, it focuses on making judgments which will affect conduct in the future. Koch, I at 62. "The objective sought in delegating rulemaking authority to an agency is to relieve Congress of the impossible burden of drafting a code explicitly covering every conceivable future problem." *Mourning v. Family Publications Service*, 411 U.S. 356, 376 (1973).

The primary factor distinguishing a rule from an adjudicative order is the "general applicability" of the former; an action addressed to a category of persons or situations is a rule. E. Gellhorn and R. Levin, *Administrative Law and Process*, 315, "Rulemaking is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class." *American Airlines v. CAB*, 359 F.2d 624, 636 (D.C. Cir. 1966) *cert. den.* 385 U.S. 843 (1966). The effect of the particular applicability clause is that when an agency issues a directive to a class, that action can be a rule as long as it has future effect. *Attorney General's Manual on Administrative Procedure Act*, 13 (1947). The generalized nature of rulemaking relates to its focus on formative issues. Koch, I at 61.

Finally, rulemaking is primarily concerned with policy considerations. B. Mintz and N. Miller, *A Guide to Federal Agency Rulemaking*, 39-40 (Administrative Conference of the United States, 1991). Rulemaking gathers facts for the purpose of making policy-type determinations. Koch, I at 61, Rulemaking is concerned with implementation or prescription of future law or policy. L. Modjeska, *Administrative Law: Practice and Procedure*, 1.8.

The IHS action terminating all direct ICP services and redirecting staff efforts into a national data gathering and technical assistance role was thus a "rule". The IHS decision was announced in an "agency statement" issued to various IHS offices and public referral sources. R.70, Exh. 7 (Exh. 47); J.A. 77. The decision had "general or particular applicability" to all handicapped Indian children who were eligible for ICP services, including the 426 children who were active ICP clients when the decision was

announced. It had "future effect" by completely eliminating services which the children were previously eligible to receive. The agency knew that its action would have this future effect on the children. The government knew the children required the long-term involvement and services the ICP had provided, holding meetings after the termination in some of the communities where the children lived to try to arrange for alternative care. J.A. 12-13, 22, 98. Through the years, the agency had provided an array of direct services to handicapped Indian children. The ICP was specific in its organizational structure, location, funding, staffing, services, and eligibility for services. When the IHS announced its decision to terminate direct services and redirect its efforts to consulting and training, it prescribed a major policy change which affected every aspect of the ICP. The decision was thus "designed to implement. . . . or prescribe law or policy," making it a "rule".

C. The Decision Was Not An Interpretative Rule But a Substantive Rule That Required Notice and Comment Procedures.

The determination that a given agency action is a "rule" does not alone establish the necessity for notice and comment rulemaking under 5 U.S.C. 553. There are various types of rules, not all of which require rulemaking. 5 U.S.C. 553(b)(3)(A).[6] "Substantive" or "legislative" rules require notice and comment rulemaking. 5 U.S.C.

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[6] However, the government expressly disclaims that the agency action was exempt from 553 rulemaking, Govt. Brief, n. 19.

553. "Interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" do not. 5 U.S.C. 553(b)(3)(A).

Substantive rules implement existing law by imposing general, extrastatutory limitations or obligations, while interpretative rules merely clarify or explain existing law. *Alcaraz v. Block*, 746 F.2d 593 (9th Cir. 1984). An interpretative rule is simply what an administrative official thinks a statute means. *Jerri's Ceramic Arts v. Consumer Product Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989). In making this determination, it is not the agency's own characterization of its actions, but what the agency did in fact which determines whether rulemaking is required. *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972). A substantive rule has "the force and effect of law" and is always "rooted in a grant of . . . power by the Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). This "binding effect" is a chief identifying feature of a substantive rule. Gellhorn and Levin at 316. The force and effect of these rules require that some opportunity to be heard must precede their promulgation. Koch, I at 133.

A rule is substantive where it implements the legislative scheme. Where the agency "attempted through this regulation to supplement the Act, not simply construe it. . . . the regulation must be treated as a legislative rule." *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980). Agency intentions in promulgating rules are not often precise and a determination whether a legislative rule should have been made through notice and comment procedures must look behind the rulemaking. Koch, I, at 135. Rules which do more than "clarify" must be analyzed to determine

whether they have binding effect. *Id.* at 147. The impact of a rule thus helps determine whether the agency was exercising its legislative rulemaking power in making the rule in question. *Id.* at 148.

Courts thus look at the effect of the rule on those interests ultimately at stake. *Neighborhood TV Co., Inc. v. F.C.C.*, 742 F.2d 629 (D.C. Cir. 1984). The determination whether a rule is legislative will frequently turn on whether the rule makes a substantial impact on the rights and duties of persons subject to the rule, or upon the public. *See, e.g., Standard Oil v. Department of Energy*, 596 F.2d 1029 (1978). Impact, and not the agency's phrasing determines whether an agency's guidelines are rules. *Western Coal Traffic League v. United States*, 694 F.2d 378 (5th Cir. 1982) *on reh.* 719 F.2d 772 (1983) *cert. den.* 466 U.S. 953 (1984).

By terminating all direct ICP services to the children and redirecting staff effort to a national consulting effort, the IHS was implementating in a drastically different way the "therapeutic and residential treatment centers" provision of the IHCIA under which it instituted the ICP. The action was taken pursuant to its Congressional grant of power regarding Indian health care. The agency did not merely issue an explanation of what is felt the law was, however, but acted in a very specific and substantive manner by directing the elimination of services and the reallocation of ICP staff. This action imposed upon the children and general public a significant change in agency policy regarding service obligations it had undertaken for handicapped Indian children under the IHCIA. The action was legislative not only because of its future effect but because of its primary concern with policy

considerations. *American Express Co. v. United States,* 472 F.2d 1050 (C.C.P.A. 1973); Mintz and Miller at 39-40.

The government attempts to paint its termination of all direct services to handicapped Indian children as not being "substantive" by describing it as a self-contained agency resource reallocation decision. Pet. at 17. The government is disingenuous in describing an action which eliminated crucial services the children had relied for many years as "self-contained". The IHS instituted ICP services in direct response to Congressional legislation providing additional appropriations for "therapeutic and residential treatment centers" to provide for their "unmet . . . need" for diagnostic and treatment services. 25 U.S.C. 1621(a) and (c)(4)(D). The termination involved critical treatment *services for them,* not merely internal administrative staff changes. To characterize the agency action as a self-contained agency resource reallocation decision is very one-sided, describing the program only in terms of the agency and completely ignoring those children the program served. The ICP did not exist simply to satisfy staff needs or internal demands of the agency, but to provide specific help to specific Indian children.

An agency statement which results in a change of "existing law, policy or practice" is a legislative rule requiring notice and comment rulemaking. *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343, 1351 and n.6 (10th Cir. 1987). An agency change in an existing rule which has substantial impact upon rights of the public requires rulemaking. *National Retired Teacher's Ass'n v. U.S. Postal Service,* 430 F.Supp. 141, 148 (D.D.C. 1977) *aff'd* 593 F.2d 1360 (D.C.Cir. 1979); *Brown Exp., Inc. v. United*

States, 607 F.2d 695 (5th Cir. 1979); *State of Alaska v. Department of Transportation,* 868 F.2d 441 (D.C. Cir. 1989). As the Court stated in *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 41-42 (1983),

> revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to proper course. . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first place.

The government's change in policy from years of providing direct services to eligible handicapped Indian children to one ceasing those services is exactly the type of change in existing policy which requires rulemaking.

Changes which affect eligibility are particularly subject to rulemaking. *Lewis-Mota v. Secretary of Labor,* 469 F.2d 478 (2d Cir. 1972); *Lewis v. Weinberger,* 415 F.Supp. 652 (D.N.M. 1976). In *Vigil v. Andrus,* 667 F.2d 931 (10th Cir. 1982), for example, the court held that the BIA's termination of a lunch program for all Indian children and its transfer of responsibility for the program's services to the USDA, which served a more limited group of Indian children, without first publishing notice of the proposed action, violated the APA. The IHS and BIA established rules determining who was eligible for ICP services. Pet. App. 1a. The agencies applied these rules in their operation of the ICP to referrals from sources in the community and to parents seeking ICP services for their children. The announcement that the ICP would no longer provide direct services to handicapped Indian

children changed their eligibility and required rulemaking to be effective.

D. *Overton Park* Distinguished

The government relies on *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), for its proposition that the ICP termination action was not rulemaking. The government's contention that *Overton Park* held that all agency actions concerning expenditures of funds are not subject to rulemaking, Govt. Brief at 31-33, is an erroneous interpretation of that decision. *Overton Park* held that an agency decision to expend federal funds to build a particular interstate highway through a public park in Memphis, Tennessee was not rulemaking or a formal adjudication that required a hearing on the record. 415 U.S. at 414-415. This holding did not declare, or even imply, that agency spending decisions never involve rulemaking.[7]

In contrast to *Overton Park*, the agency action here involved an on-going program which provided services for many years to needy recipients with whom the government has a special relationship. The agency decision here was not limited to a particular site or individual, but involved termination of an entire program created and

[7] The examples of agency actions which the government describes as funding or resource allocations and fears would always require rulemaking, Govt. Brief at 32-33, are subject to the rulemaking exception for matters "relating to agency management or personnel or to public property, loans, grants, benefits or contracts." 5 U.S.C. 553(a)(2).]

defined by the agency itself. In creating the ICP, the IHS and BIA adopted standards of general applicability which determine who is eligible for the program and define the services to be provided. Thus, unlike the situation presented in *Overton Park*, the ICP termination involved a change in general "rules," articulated by the agency in advance to govern the availability of services to each individual who applied for services under the program.

Where an agency exercises its power to establish a program, specifies the services that will be provided, and adopts eligibility criteria identifying the individuals to be served, the agency is not merely making a spending decision, but is exercising its legislative authority to create law defining the services to be provided by the government, and who is eligible to receive them. Such standards clearly constitute "rules". The revocation of the program revoked these rules, or, in the case of the BIA, altered the eligibility standards so handicapped Indian children who were not in BIA schools were no longer eligible. Like any other agency action that defines, limits eligibility, or terminates a program that promises services to specified individuals, the agency's action here constituted rulemaking.

E. The Purposes of the APA Are Met By Requiring Notice And Comment Procedures

The rulemaking requirements of 5 U.S.C. 553 were designed to assure fairness and mature consideration of rules of general application. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Congress chose notice and comment procedures to ensure that agency policy decisions

are "both informed and responsive." *American Bus Association v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980). These "procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rule-making before an informed and skeptical public." *New Jersey v. Department of HHS*, 670 F.2d 1262, 1281 (3d Cir. 1981). 553 rulemaking is an especially attractive way to make policy democratically. K. Davis, *Administrative Law Text*, 142. While the benefits of notice and comment rulemaking are well established, the government's fear that a rulemaking requirement in this case would adversely affect the operation of Indian health programs is unsubstantiated. The APA specifically provides an exception from rulemaking whenever "the agency for good cause finds . . . that notice and public procedures are impracticable, unnecessary, or contrary to the public interest." 5.U.S.C. 553(b)(3)(B). 5 U.S.C. 553(d)(3) also allows an agency, upon finding good cause, to make a rule effective immediately, thereby avoiding the 30 day delayed effective date requirement of 553. Thus, the only effect that rulemaking here will have on the government operation of its Indian programs is that very effect that Congress intended when it enacted the APA, that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

F. The Obligations of the Federal Government's Special Relationship to Indians Require Notice and Comment Procedures Prior to Termination of Services to Indians.

The federal government has certain responsibilities to Indians which derive from their long-standing and unique relationship, first described by Justice Marshall as the relationship of "a ward to his guardian". *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). "Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court," the government has "charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). "The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions." *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). Given the long history of unfair treatment and broken promises to Indian people in this country, the "duty . . . to deal fairly" recognized by this Court must mean more than empty words. At a minimum, the manner in which the ICP was terminated can be reviewed under this duty of fairness. *See, e.g. Kenai Oil & Gas, Inc. v. Dept. of Int. of U.S.*, 671 F.2d 383 (10th Cir. 1982). While the agency may "create reasonable classifications and eligibility requirements in order to allocate the limited funds available," the "agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." *Morton v. Ruiz*, 415 U.S. 199, 230-231 (1974). Thus, it is appropriate that prior

to termination of services to Indians, they be given notice and opportunity to comment. *See, e.g., Vigil v. Andrus*, 667 F.2d 931, 936 (10th Cir. 1982)

Furthermore, this Court has specifically recognized that in "extemely compelling circumstances," the courts have the power to fashion and require agencies to afford procedural protections which are neither required by the Constitution nor the APA. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978). The summary, no-notice termination of an entire program providing critical services for Indian children to whom the government has a special responsibility presents exactly the type of situation in which at least the minimal procedural protections of notice and comment should be afforded.

II. THE RELIEF GRANTED BELOW MUST BE AFFIRMED BECAUSE THE GOVERNMENT FAILED TO APPEAL THE DISTRICT COURT'S RULING THAT THE ICP TERMINATION DECISION WAS A STATEMENT OF GENERAL POLICY THAT THE AGENCY WAS OBLIGATED TO PUBLISH IN THE FEDERAL REGISTER BEFORE IT COULD BECOME EFFECTIVE.

In addition to holding the ICP termination ineffective for violation of the rulemaking requirements of 5 U.S.C. 553, the district court held that ICP termination ineffective for violation of the publication requirements of 5 U.S.C. 552(a)(1). The district court ruled that the termination decision was a general statement of policy which the agency was obligated to publish in the Federal Register before it could become effective. Pet. App. 41a-42a. Since

the government did not appeal this holding, the relief granted below must be affirmed.

III. TERMINATION OF THE ICP WAS ALSO SUBJECT TO JUDICIAL REVIEW TO DETERMINE WHETHER THE AGENCY ACTION WAS CONTRARY TO LEGISLATIVE MANDATE OR ARBITRARY AND CAPRICIOUS

A. The Presumption In Favor Of Judicial Review And The Canon That Statutes Enacted To Benefit Indians Be Construed In Their Favor Required Review Of The ICP Termination.

1. A Strong Presumption Favors Judicial Review of Agency Actions

The Administrative Procedure Act provides that "[a] person . . . adversely affected or aggrieved by agency action . . . is entitled to judicial review." 5 U.S.C. 702. In determining whether judicial review is proper, "[w]e begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 670 (1986). The presumption in favor of judicial review

> is a well entrenched precedent that reflects widely held convictions about the value of judicial review in our system of government . . . Scrutiny of administrative action by an independent judiciary is an integral part of the American checks and balances system – a powerful deterrent to abuses of power and an effective remedy when abuses occur. By helping maintain public confidence that government

> officials remain subject to the rule of law, judicial review also bolsters the legitimacy of agency action.

R. Levin, 74 Minn. L. Rev. 689, 742 (1990).

Only when "statutes preclude judicial review" or when the "agency action is committed to agency discretion by law" is judicial review excluded. 5 U.S.C. 701(a)(1) and (2). The exception for agency action committed to agency discretion is a "very narrow exception". *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). It applies only "in those rare circumstances where statutes are drawn in such broad terms that in a given case there is no law to apply," *Id.* In *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), the phrase "no law to apply" was explained to exclude judicial review where the statute contains "no meaningful standard against which to judge the agency's exercise of discretion."[8] However, "[t]he general exception to reviewability provided by 701(a)(2) for action 'committed to agency discretion' remains a narrow one," *Heckler v. Chaney*, 470 U.S. at 838, and the Court has remained firmly committed to the presumption in favor of judicial review. *See, Bowen v. Michigan Academy of Physicians*, 476 U.S. 667 (1986); *Traynor v. Turnage*, 485 U.S. 535 (1988); *United States v. Fausto*, 484 U.S. 439 (1988); *McNary v. Haitian Refugee Center*, 498 U.S. ___, 111 S.Ct. 888 (1991).

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[8] The presumption of unreviewability for an agency refusal to take enforcement action found in *Heckler v. Chaney*, 470 U.S. 821 (1985), is inapplicable in other contexts. *Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985). The agency action here was affirmative, terminating an entire program.

The Court has limited the exception to judicial review "to cases involving national security . . . or those seeking review of refusal to pursue enforcement actions." *Franklin v. Massachusetts*, 505 U.S. ___, 120 L.Ed.2d 636, 661 (1992) (Concurring Opinion). "These are areas in which courts have long been hesitant to intrude." *Id.* at 662. The administration of Indian affairs through government programs implemented to serve Indian people is not such an area of traditional deference.[9] *See e.g., Morton v. Ruiz*, 415 U.S. 199 (1974); *White v. Califano*, 581 F.2d 697 (8th Cir. 1978); *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987); *Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974); *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980); *Lewis v. Weinberger*, 415 F.Supp. 652 (D.N.M. 1976). Although the federal government has intruded extensively in the affairs of Indian people throughout the more than two centuries of their relationship, Indian people have not fared well and their health care lags behind that of other Americans. The respondents, who are handicapped, children, and Indian, are perhaps the most disenfranchised segment of our society. Judicial review safeguards the interests of those who are unable to participate in the political process. To ensure that the IHS and BIA responsibly carry out their administration of Indian

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[9] Although the government cites various cases for its proposition that all agency resource allocation and economic decisions are judicially unreviewable, Gov't Brief at 28-29, none of these cases involved termination of an entire program providing direct health services to a group of people with whom the government has a special relationship. Moreover, the termination of the ICP was not based on a funding reduction. J.A. 97.

affairs, judicial review must be made available to the Indian people they exist to serve.

2. Statutes Enacted to Benefit Indians Must be Liberally Construed in Their Favor.

Statutes enacted to benefit Indians must be liberally construed in their favor. *Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974); *Wilson v. Watt*, 703 F.2d 395 (9th Cir. 1983). Thus, the Snyder Act and the IHCIA must be interpreted in such a way as to favor, rather than restrict, judicial review under the APA. This is especially true here where the children have stated claims that these Acts have been violated by the very agencies obligated to serve them. If there is any uncertainty as to the construction of these Acts, they must be interpreted in the children's favor pursuant to this "eminently sound and vital canon," *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n. 7 (1976). "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith. (citation omitted)." *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

B. The Applicable Statutes, Prior Agency Actions, And Legal Principles Governing The Federal Government's Obligations Toward Indians All Provide Law To Apply For Judicial Review Of The ICP Termination.

1. Statutes

a. The Snyder Act

The Snyder Act, 25 U.S.C. 13, requires that "the Bureau of Indian Affairs . . . shall direct, supervise, and expend such moneys as Congress may . . . appropriate, for the benefit, care, and assistance of the Indians . . . [f]or relief of distress and conservation of health." Agency actions not in accord with these requirements are contrary to the purposes of the Act. Although broad, this standard is not so devoid of meaning as to grant the agencies unfettered discretion in their use of its funding. The standard is sufficient to determine whether an agency action follows the purposes of the Act or is one which fundamentally undermines its mission.

It is not enough for the agency to say that the Snyder Act permits it to redirect "staff efforts into a national data gathering and technical assistance role," Pet. App. 20a, when that action comes at the expense of the health and development of thousands of handicapped children in the Southwest. The agency's termination of the entire program, eliminating services to a whole group of children, in a large area of the country, is the kind of broad action which can be judged by a broad standard. The test is not whether a statute viewed in the abstract lacks law to be applied, but, rather, whether *in a given case* there is no law to be applied. *City of Santa Clara v. Andrus*, 572 F.2d 660,

666 (9th Cir. 1978) *cert. den.* 439 U.S. 859 (1978). No matter how this question might ultimately be decided in a review on the merits, however, *access* to that review is not precluded by the breadth of the Snyder Act standard. Substantial deference is already granted to agencies in the *scope* of review determination. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). To move this deference up into the threshold jurisdictional determination will eviscerate the presumption in favor of judicial review and turn the "very narrow" and "rare" exception into the norm, contrary to the intent of the APA.

b. The Indian Health Care Improvement Act

The ICP was funded pursuant to the IHCIA, 25 U.S.C. 1601 *et seq.*[10] The IHCIA provides funds for specified services and programs to supplement Snyder Act funding. Thus, when Congress passed the IHCIA it constrained the discretion IHS may have had under the broad mandate of the Snyder Act and required IHS to use IHCIA funds for those services and programs Congress wanted provided to Indian people. In specifying that certain funds and positions be used for "therapeutic and residential treatment centers," in order to provide for "known, unmet . . . Indian health needs," 25 U.S.C. 1621(a) and (c)(4)(D), Congress did not intend that IHS use these funds for consulting and training.

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[10] The government admitted that the ICP was funded by the IHS under the IHCIA. Gov't 10th Cir. Brief at 3-6. *See, also, Approp. for 1985, House*, 98th Cong., 2d Sess., pt. 3, 486.

The goals of the IHCIA and the specific factors with which Congress was concerned in enacting it provide further standards by which to review the ICP termination. Congress declared that

> it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with resources necessary to effect that policy. 25 U.S.C. 1602.

Since IHS is the nation's lead agency for the provision of health care services to Indians, the mandate of the IHCIA is the mandate of the IHS, providing a measure by which all IHS actions may be judged.

Congress identified certain specific factors plaguing Indian health care which it wanted IHS to address. *See* 25 U.S.C. 1601(f). IHCIA funding was to be used to overcome these problems. The Act thus provides parameters within which the problems of handicapped Indian children's health care are to be overcome and their health improved, not parameters within which IHS could reduce their health care and lower their health status. A reviewing court can thus "consider whether the decision was based on a consideration of the[se] relevant factors" to determine "whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).[11]

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[11] "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to considered, entirely failed to consider an

25 U.S.C. 1601(a) provides that Indian health services are "required" by the special Federal-Indian relationship and must be used to "maintain and improve" the health of Indian people. 1601(f) notes that health care is imperiled by insufficient services. 1601(b) establishes that congress seeks to provide both a sufficient "quantity and quality of health services which will permit the health status of Indians to be raised to the highest level possible." As a result of the ICP termination, both the quality and quantity of IHS services to handicapped Indian children were greatly reduced. The ICP termination actually *created* a situation where the children had inadequate or no services available to them. R. 108, Exh. 2-13, 16. While insufficient funding will result in an insufficient quantity of services to meet all needs, *existing* services must be provided in a way which "raises" Indian health status. The IHS action here caused the children substantial harm, reducing rather than raising their health status.

25 U.S.C. 1601(f)(5) provides that lack of access to health services due to "remote residences, undeveloped or underdeveloped communication and transportation systems, and difficult, sometimes severe, climate conditions" must be overcome. The ICP was perhaps unique in its ability to meet these difficulties. By its service delivery model using traveling teams in remote, rural, reservation

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important aspect of the problem, offered an explanation for its decision which runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

areas, IHS was able to provide the ICP services in the childrens' home communities.

25 U.S.C. 1601(g) requires that health care services be provided to the Indian people in a way which accomplishes their "growth of confidence" in that care. Summary termination of a program which had for years provided essential services could certainly be found to accomplish exactly the opposite result and thus be determined arbitrary. Dr. Robert Robin of the Hopi Tribe stated it succinctly:

> A . . . disturbing factor is . . . that the ICP may pull out of providing consistent and regular visits to Indian communities without first taking the both logical and etiquette approach of consulting with these communities *before* redirecting its emphasis. . . . Trust is such a difficult commodity to establish, and I would hate to see it cast aside so readily, especially being aware of the long trail of broken commitments that preceded the Indian Children's Program. R. 70, Exh. 7 (Exh. 44)

2. Prior Agency Actions And Rules Establishing Eligibility

a. Agency Representations to Congress Regarding the ICP

Following enactment of the IHCIA in 1976, IHS presented to Congress its plan that the ICP would provide diagnostic and therapy services to handicapped Indian children. *Approp. for 1978, House*, 95th Cong., 1st Sess., pt. 4, 182-183. The IHS plan was in direct response to the Congressional provisions for "therapeutic and residential

treatment centers" in Title II of the IHCIA. Each year thereafter, the IHS Director told Congressional appropriations committees that IHS was funding the ICP in order to pursue a policy of providing services to handicapped Indian children through the ICP, describing those services, their importance, and identifying those eligible to receive them.[12] These annual representations were part of IHS effort to obtain continued funding for its programs, including the ICP, as well as in response to questions from the Congressional committees asking about the activities of the ICP, the success it was having, and whether it would be continued. These representations and the exchanges between the IHS Director and the committees evince not only a Congressional interest in the ICP, but an intent that it continue.

This history of IHS representations to Congress as part of its appropriations process regarding the agency is relevant as "law to apply" for purposes of judicial review. *International Union, United Auto., Aerospace v. Donovan*, 746 F.2d 855 (D.C.Cir. 1984). Questions regarding the federal responsibility for Indian health care "must be answered in terms of congressional intent and the federal government's overriding trust responsibility." *McNabb v. Bowen*, 829 F.2d 787, 793 (9th Cir. 1987). These representations are primarily relevant here, not in terms of how Congress "required [the agency] to behave," *International*

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[12] *See, e.g., Approp. for 1980 House*, 96th Cong., 1st Sess., pt. 8, at 245; *Approp. for 1980, Senate*, 96th Cong., 1st Sess., pt. 2, at 1544-45; *Approp. for 1981, House*, 96th Cong., 2d Sess., pt. 11, at 218; *Approp. for 1982, House*, 97th Cong., 1st Sess., pt. 9, at 70-74; *Approp. for 1983, House*, 97th Cong., 2d Sess., pt 3, at 167; *Approp. for 1984, House*, 98th Cong., 1st Sess., pt. 3, at 351.

Union at 860, but in terms of how the agency itself decided to behave. These representations document and establish the "existing law, policy or practice" from which the agency could not depart without complying with APA procedures. *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1351 and n. 6 (10th Cir. 1987). An agency "policy or practice" provides law which can be used to judge the agency's departure therefrom. *Robbins v. Reagan*, 616 F.Supp. 1259 (D.D.C. 1985) *aff'd* 780 F.2d 37 (D.C. Cir. 1985). Agency representations to Congress are a part of the appropriations history which is relevant and may be referred to "for guidance in determining the proper rules for providing Indian health assistance." *McNabb v. Bowen*, 829 F.2d 787, 793, note 6 (9th Cir. 1987); *Morton v. Ruiz*, 415 U.S. 199 (1974). Thus, in determining the propriety of a BIA termination of general assistance benefits to Indians living off, but near an Indian reservation, the Court noted:

> [e]ven more important is the fact that, for many years, to and including the appropriations year at issue, the BIA itself made continual representations to the appropriations subcommittees that nonurban Indians living "near" a reservation were eligible for BIA services. *Id* at 214.

b. The Government's Administrative Policy Of Providing Services To Handicapped Indian Children Through the ICP

Following the enactment of the Indian Health Care Improvement Act in 1976, until the program was terminated in 1985, the IHS pursued a policy of providing handicapped Indian children with direct evaluation and

treatment services through the ICP. The services provided throughout the existence of the ICP consistently addressed the need to identify and diagnose handicapped Indian children, plan and monitor their treatment plans, and ensure that they received the therapy and treatment they needed. Throughout its existence, the ICP was specific in its organizational structure, location, funding, and staffing, as well as its services. The decision to terminate the ICP drastically altered this policy. An administrative policy which is consistently followed over a period of time provides "law to apply" in reviewing the agency's exercise of discretion. *Franklin v. Massachusetts*, 505 U.S. ___, 120 L.Ed.2d 636, 662 (1992) (Concurring Opinion). Here, the "statutory framework and the long held administrative tradition," *Id.*, for the provision of services to handicapped Indian children through the ICP, all set against the backdrop of "the federal government's overriding trust responsibility to Indians," provide a judicially administrable standard of review. *McNabb v. Bowen*, 829 F.2d 787, 793 (9th Cir. 1987). In addition, "it can be presumed that [Congress] intends that the agency make its [funding] allocation based on factors solely related to the goal of implementing the stated statutory purposes in a reasonable fashion." *Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985). "Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy." *Id.* at 45, citing *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-44 (1983). Thus, "an agency's change in direction from a previously

announced intention is a danger signal that triggers [judicial] scrutiny." *Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985).

c. Agency Eligibility Rules

Under eligibility rules established by the agencies, ICP services were available to any otherwise IHS or BIA eligible handicapped Indian child from birth through 21 years. Pet. Reply App. 1a-2a. Under IHS eligibility regulations applicable at the time of the ICP termination, its services "will be made available" to "persons of Indian descent." 42 C.F.R. 36.12(a) (1986) These eligibility rules provided that the services that "will" be made available "depend upon the facilities and services available from sources other than the Service and the financial and personnel resources made available to the Service." 42 C.F.R. 36.11(c) (1986).

Under these rules, the children were clearly eligible for continued ICP services to the point the ICP termination decision was announced. Thereafter, however, they were no longer eligible for the direct services they had been receiving. However, nothing had changed in the eligibility situation. The children were still in need of the crucial services provided by the ICP, the ICP staff remained intact and capable of continuing those services, and the funding for the ICP remained unchanged. R. 70, Exh. 3, No's 18-19. Since the need, the staff assembled to meet the need, and the Congressional funding provided for the program remained, nothing about the "financial and personnel resources *made available to the Service*" had changed. The only change was a change in IHS policy to redirect the focus of the ICP. Since the ICP services the

children had been receiving continued to remain "available", the eligibility rule that "[s]ervices *will* be made available . . . to persons of Indian descent" required that IHS continue providing these ICP services to them.

Furthermore, even assuming that "funds, facilities, or personnel [we]re insufficient to provide [continuing ICP direct] services," the "[p]riorities for care and treatment, as among individuals who are within the scope of the program, will be determined on the basis of relative medical need and access to other arrangements for obtaining the necessary care." 42 C.F.R. 36.12(c) (1986). This rule requires a factual assessment of the need for care and treatment, the urgency of this need, and the actual availability of other resources to provide this care and treatment. IHS failed to meet these requirements before discontinuing ICP services to the children.

d. The Indian Health Service Manual

The IHS Manual provides further law to apply. Most pertinent are provisions in Chapter 13 of the Manual which specify policies, procedures and services applicable in the areas of maternal and child health and mental health programs. Resp. App., 10a-16a. The IHS Manual specifically addresses services that are to be provided to handicapped children and the manner in which they are to be provided. Chapter 13, Section 3-13.6(A) states that "this section sets forth the IHS . . . responsibilities . . . for meeting specific health needs of infants and children." It thereafter requires that "services must be provided that will emphasize the importance of preventing handicapping conditions or preventing the extension of existing

conditions." *Id.* The specific handicapped issues to be addressed by these services include early identification of defects (to ensure a comprehensive screening and individual education plan) and management (to ensure long-term treatment and coordination of referral and follow-up services). *Id.*

If these services sound familiar it is because they are virtually identical to those provided by the ICP. In effect, IHS used the ICP as the vehicle to provide those services its Manual required it to provide to handicapped Indian children. Thus, the Manual expresses the interpretation of the IHS regarding the duties it was obligated to undertake pursuant to its mandate to provide health care services to the Indian people.

3. The Obligations of the Federal Government's Special Relationship to Indians For Their Health Care

Congress and the courts have recognized that the legal responsibilities of the special relationship between the federal government and the Indian people apply in the context of Indian health care. IHCIA, 25 U.S.C. 1602; *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987); *White v Califano*, 437 F.Supp. 543 (D.S.D. 1977) *aff'd* 581 F.2d 697 (8th Cir. 1978). The IHCIA was specifically enacted so that the United States could fulfill "its special responsibilities and legal obligations to the American Indian people." 25 U.S.C. 1602. 1601(a) provides that

> Federal health services to . . . Indians are consonant with and required by the Federal Government's historical and unique legal relationship

with, and resulting responsibility to, the American Indian people.

Although the government argues that it is only constrained by this "trust" responsibility when it deals with Indian property, Govt. Brief at 22, Congress made clear through 1601(a) and 1602 that the government provides Indian health care as a direct result of this special relationship. In effect, Congress admitted for the IHS that the "trust" responsibility applies to its provision of health care. Moreover, IHS itself recognized that it provided health services to Indian people pursuant to the "trust" relationship. *Approp. for 1981, Senate*, 96th Cong., 2d Sess., pt. 1, at 836.

C. The Agency's Unjustified Factual Assumption That Alternative Sources Would Provide the Children with The Same Services They Had Been Provided By the ICP After The ICP Was Terminated Provides A Basis For Judicial Review.

Judicial review is also required because the children claimed the agency action was arbitrary and capricious because based on an unjustified factual assumption. Where an agency action is alleged to lack an adequate factual basis or is alleged to be contrary to the evidence before the agency, the action can be determined arbitrary. *See, e.g., Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 630-636 (1986) (Rules prohibiting hospitals from withholding treatment to handicapped infants despite parental objection set aside because they lacked an adequate factual basis); *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (Rule is arbitrary if

agency's "explanation for its decision . . . runs counter to the evidence before the agency.") In such situations, even if there is no law to apply to determine how the agency *must* use its discretion, it is clear that there are accepted ways it *must not* use it. R. Levin, 74 Minn. L. Rev. 689, 715.

The children alleged that services alternative to those provided by the ICP were not available from the IHS or any other source. J.A. 12-13. Nevertheless, Dr. Kreuzberg, the IHS official who made the decision to terminate the ICP, was not aware that alternative services were not actually available. Instead, he incorrectly assumed that the children would continue to receive from other sources the same services they had been receiving from the ICP. Kreuzberg Depo., pp. 72-73, 81, 87, 90-91, 95, 107-108; Depo. Exh. 12. This inadequate and unjustified factual basis for the decision to terminate the ICP renders the action arbitrary and provides a separate basis for judicial review.[13]

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[13] IHS regulations required that any determination of what services IHS would provide in a particular area would depend in part "upon the facilities and services available from sources other than the Service." 42 C.F.R. 36.11(c) (1986). Thus, the nonexistence of alternative resources is directly relevant in determining the propriety of the ICP termination.]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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